## Public Prosecutor v Letchumanan a/l Krishnan

HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO MT(3)45–69 OF 2004
MOHD ZAWAWI SALLEH JC
27 NOVEMBER 2007

*Criminal Law — Murder — Ingredients of — Motive, when relevant — Evidence against accused merely circumstantial — Whether such evidence pointed exclusively to guilt of accused — Whether death of accused possibly due to accidental causes — Whether prima facie case of murder established against accused — Penal Code s 302*

*Criminal Procedure — Accused — Police report — Admissibility — Police report of accused not dated — Whether such police report admissible*

*Criminal Procedure — Witness — Calling of witness by prosecution — Material witness not called by prosecution or offered to defence — Whether serious gap in prosecution's case*

*Evidence — Circumstantial evidence — Nature of — Whether pointed exclusively to guilt of accused*

*Evidence — Documentary evidence — Police report — Admissibility — Undated copy of police report — Whether certified according to s 76 of Evidence Act 1950 — Whether such police report admissible*

*Evidence — Statement — Police report — Admissibility — Police report of accused not dated — Whether admissible — Whether of limited evidentiary value — Evidence Act 1950 s 76*

*Evidence — Witness — Failure of prosecution to call witness — Witness not offered to defence — Material witness — Whether serious gap in prosecution's case*

The accused was charged with the murder of a one year-old child. The facts were that on 17 March 2004, the accused brought the motionless body of the

child-victim to the police station. He believed the child to be dead and made a police report ('P6') describing, inter alia, how he believed the child had died. Apparently, the child had the night before (16 March 2004), pulled over a plastic tablecloth upon which he had placed hot water and scalded herself. He had then rubbed some ointment over the scalded parts of her body and put her to sleep. When he awoke the next morning, he found the child motionless and believed she had died. The police investigating officer ('PW6') examined the body of the child and found approximately 50% of the child's body to be scalded. PW6 then instructed a female police officer to take the body of the child to the hospital for a post-mortem. PW6 then went to the flat of the accused where he seized a kettle, some ointment and a table with tablecloth. The pathologist ('PW7') who conducted the post-mortem, found a quarter of the victim's body scalded but determined that death was caused by a head injury. He did not give evidence of the victim's time of death. PW7 testified during the prosecution's case that he believed the child had been beaten but conceded during cross-examination and re-examination that the head injury could have been caused by a kettle full of water falling on the child's head. The prosecution adduced uncontroverted evidence that the child had been alone with the accused at the material time. Though the prosecution's case was based entirely on circumstantial evidence, the prosecution contended that there was sufficient evidence to show that the accused threw the child against the wall because she kept on crying and then poured hot water over her body. The High Court had thus to decide: (i) whether the prosecution had established a prima facie case; and (ii) whether the police report of the accused ('P8') was admissible, notwithstanding that the copy tendered was not the original, undated and its certification irregular.

**Held**, acquitting the accused:

(1) The cumulative effect of all the circumstantial evidence was insufficient to conclusively find that the death of the deceased was caused by or was a consequence of the act of the accused (see para 18).

(2) The court could not discount the possibility that the deceased who could move by using a walker had moved to the table and pulled at the sheet (tablecloth) of the table causing the kettle to accidentally fall on her head. There was thus a possibility that the death of the deceased was accidental (see para 19).

(3) At best, the evidence presented at the trial was sufficient to arouse suspicion, but not support an inference that the accused was the perpetrator of the crime. There was not a shred of incriminating evidence presented by the prosecution, whether direct or circumstantial, to substantiate the assertion by the prosecution that the accused threw

the deceased to the wall because she kept on crying and that he also poured hot water over her body (see para 21). A

(4) Circumstantial evidence alone may be sufficient to secure a conviction for murder since the law makes no distinction between circumstantial evidence and direct evidence, provided it is inconsistent with any other hyphothesis than that of guilt of the accused. Such evidence should not also leave gaps (see para 22). B

(5) Motive does not establish guilt and is not an essential ingredient for murder. However, in the instant case, in view of the evidence that the relationship between the deceased and the accused was good and that the accused loved the deceased, establishing motive was crucial in order to tilt the scales against the accused (see para 26). C

(6) P8 was not dated as required by s 76 of the Evidence Act 1950 (the Act) and was therefore inadmissible. Concerning its evidentiary value, P8 was not a substantive piece of evidence and was not admissible for the purpose of proving that the facts stated in it were correct. Its evidentiary value was only to contradict the testimony of the accused under s 145 of the Act or to corroborate his testimony under s 157 of the said Act. Evenassuming it was admissible as evidence, P8 did not support the prosecution's case because it did not implicate the accused with the offence charged (see para 30); *Balachandran v PP* [2005] 2 MLJ 301 referred. D E

(7) The failure by the prosecution to call or offer to the defence, the female police officer who took the deceased victim to the hospital on the instructions of PW6, gave rise to a serious gap in the prosecution's case. Further, PW6 did not mention any head injury when he testified of checking the victim's body. PW7 did not give evidence of the time of the deceased victim's death. There was thus a possibility that the victim was merely unconscious when brought to the police station but suffered the fatal head injury on the way to the hospital (see paras 10 & 33–34). F G

**[Bahasa Malaysia summary**

H

Tertuduh telah dikenakan tuduhan membunuh seorang kanak-kanak berumur setahun. Menurut fakta pada 17 Mac 2004, tertuduh telah membawa tubuh kaku seorang mangsa kanak-kanak ke balai polis. Dia percaya kanak-kanak itu telah meninggal dan membuat laporan polis ('P6') menggambarkan, antara lain, macam mana dia percaya kanak-kanak itu telah meninggal. Jelasnya, kanak-kanak tersebut telah, pada malam sebelumnya (16 Mac 2004) menarik alas meja plastik yang mana tertuduh telah meletak air panas di atasnya, dan badannya melecur. Tertuduh kemudiannya telah menyapukan salap pada bahagian yang melecur dan I

menidurkan kanak-kanak tersebut. Apabila beliau terjaga keesokkan paginya, beliau mendapati kanak-kanak tersebut kaku and percaya yang beliau telah meninggal. Pegawai polis penyiasat ('PW6') memeriksa mayat kanak-kanak tersebut dan mendapati lebih kurang 50% badan kanak-kanak tersebut melecur. PW6 kemudiannya mengarahkan seorang pegawai polis perempuan untuk membawa mayat kanak-kanak tersebut ke hospital untuk autopsi. PW6 kemudiannya telah pergi ke flat tertuduh di mana beliau telah merampas sebuah cerek, sedikit salap dan meja bersama alasnya. Pakar patologi ('PW7') yang menjalankan autopsi tersebut, mendapati suku daripada bahagian badan mangsa melecur tetapi memutuskan bahawa kematian disebabkan oleh kecederaan kepala. Beliau tidak memberikan bukti berkenaan masa kematian mangsa. PW7 memberikan keterangan semasa kes pihak pendakwaan bahawa beliau percaya kanak-kanak tersebut telah dipukul tetapi mengakui semasa pemeriksaan balas dan pemeriksaan semula bahawa kecederaan kepala tersebut boleh disebabkan oleh cerek yang penuh air terjatuh ke atas kepala kanak-kanak tersebut. Pihak pendakwaan mengemukakan keterangan yang tidak dipertikaikan bahawa kanak-kanak tersebut telah berada bersendirian dengan tertuduh pada masa material. Walaupun kes pihak pendakwaan berdasarkan secara keseluruhannya pada keterangan ikut keadaan, pihak pendakwaan menghujah bahawa terdapat keterangan yang mencukupi untuk menunjukkan bahawa tertuduh menghempas kanak-kanak tersebut ke dinding kerana dia asyik menangis dan kemudian mencurahkan air panas ke badannya. Mahkamah Tinggi oleh itu harus memutuskan: (i) sama ada pihak pendakwaan telah membuktikan kes prima facie; dan (ii) sama ada laporan polis tertuduh ('P8') boleh diterima, walaupun salinan yang dikemukakan bukan yang asal, tidak bertarikh dan perakuannya di luar aturan.

**Diputuskan**, membebaskan tertuduh:

(1) Kesan kumulatif dari kesemua keterangan ikut keadaan adalah tidak mencukupi untuk mendapati secara konklusif bahawa kematian si mati adalah disebabkan oleh atau akibat daripada perbuatan tertuduh (lihat perenggan 18).

(2) Mahkamah tidak dapat menolak kemungkinan bahawa si mati yang boleh bergerak dengan menggunakan *walker* telah bergerak ke meja dan menarik alas meja dan menyebabkan cerek tersebut menimpa kepalanya dengan tidak sengaja. Dengan itu terdapat kemungkinan bahawa kematian tersebut berlaku secara tidak sengaja (lihat perenggan 19).

(3) Paling baik, keterangan yang dikemukakan semasa perbicaraan adalah mencukupi untuk menimbulkan keraguan, tetapi tidak menyokong inferens bahawa tertuduh adalah pelaku jenayah tersebut. Tidak terdapat walau sedikit pun keterangan yang mensabitkan

kesalahan yang dikemukakan oleh pendakwaan, sama ada secara terus atau ikut keadaan, untuk menyokong penegasan oleh pendakwaan bahawa tertuduh menghempas si mati ke dinding kerana beliau asyik menangis dan juga beliau (tertuduh) mencurahkan air panas ke badan mangsa (lihat perenggan 21).

(4) Keterangan mengikut keadaan sahaja mungkin mencukupi untuk mensabitkan pembunuhan memandangkan undang-undang tidak membuat sebarang perbezaan di antara keterangan mengikut keadaan dan keterangan terus, dengan syarat ia tidak konsisten dengan sebarang hipotesis melainkan dengan kesalahan tertuduh. Keterangan tersebut juga tidak harus meninggalkan sebarang jurang (lihat perenggan 22).

(5) Motif tidak membentuk kesalahan dan bukan isu yang utama bagi pembunuhan. Namun begitu, dalam kes ini, melihat kepada keterangan bahawa hubungan di antara si mati dan tertuduh adalah baik dan tertuduh menyayangi si mati, pembuktian motif adalah penting untuk memberatkan imbangan menentang tertuduh (lihat perenggan 26).

(6) P8 tidak bertarikh seperti yang dikehendaki oleh s 76 Akta Keterangan 1950 ('Akta tersebut') dan oleh itu tidak boleh diterima. Berkenaan nilai keterangannya, P8 bukan satu keterangan yang substantif dan tidak boleh diterima untuk tujuan membuktikan fakta-fakta yang terkandung adalah betul. Nilai keterangannya adalah hanya untuk menyangkal testimoni tertuduh di bawah s 145 Akta tersebut atau untuk menyokong testimoni beliau di bawah s 157 Akta tersebut. Walaupun dengan menganggap ia boleh diterima sebagai keterangan, P8 tidak menyokong kes pendakwaan kerana ia tidak mensabitkan tertuduh dengan kesalahan yang dituduh (lihat perenggan 30); *Balachandran v PP* [2005] 2 MLJ 301 dirujuk.

(7) Kegagalan pihak pendakwaan untuk memanggil atau menawarkan kepada pembelaan, pegawai polis wanita yang membawa si mati ke hospital atas arahan oleh PW6, menimbulkan jurang perbezaan yang serius dalam kes pendakwaan. PW6 tidak menyebut tentang sebarang kecederaan kepala apabila beliau memberi keterangan tentang pemeriksaan badan mangsa. PW7 tidak memberikan keterangan berkenaan masa mangsa meninggal dunia. Oleh itu terdapat kemungkinan yang mangsa hanya tidak sedar sewaktu dibawa ke balai polis tetapi mengalami kecederaan kepala yang membawa maut semasa dalam perjalanan ke hospital (lihat perenggan 10 & 33–34).]

**Notes**

For a case on calling of witness by prosecution, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 5108.

For a case on nature of circumstantial evidence, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 634.

For cases on failure of prosecution to call witness, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2735–2742.

For cases on murder in general, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1154–1167.

For cases on police report, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 30–39.

For cases on police report as documentary evidence, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1207–1211.

For cases on police report as statement, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2423–2428.

**Cases referred to**

*Balachandran v PP* [2005] 2 MLJ 301 (refd)
*Chong Kim Siong v PP* [1968] 1 MLJ 36 (refd)
*Dato' Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 (refd)
*Idris v PP* [1960] MLJ 296 (refd)
*Juraimi bin Hussin v PP* [1998] 1 MLJ 537 (refd)
*Karam Singh v PP* [1967] 2 MLJ 25 (refd)
*Kartar Singh & Anor v R* [1952] MLJ 85 (refd)
*Looi Kow Chai & Anor v PP* [2003] 2 MLJ 65 (refd)
*Norliana bte Sulaiman v PP* [2000] 4 MLJ 752 (refd)
*PP v Brahim bin Rais* [1999] MLJU 305 (refd)
*PP v Chong Chai* [2006] 3 MLJ 612 (refd)
*PP v Hanif Basree bin Abdul Rahman* [2007] 2 MLJ 320 (refd)
*PP v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 (refd)
*Pressley v State* [1983] 295 Md 143 (refd)
*Ram Avtar v The State (Delhi Administration)* AIR 1985 SC 1692 (refd)
*Sunny Ang v PP* [1966] 2 MLJ 195 (refd)
*Teoh Hoe Chye v PP* [1987] 1 MLJ 220 (refd)

**Legislation referred to**

Criminal Procedure Code ss 180, 180(2)
Evidence Act 1950 ss 76, 145, 157
Penal Code ss 300, 300(a), 300(b), 300(c), 300(d), 302

*Husmin Hussin (Deputy Public Prosecutor) (Johore State Legal Advisor) for the prosecution.*
*Gobind Singh Deo (Gobind Singh Deo & Co) for the accused.*

**Mohd Zawawi Salleh JC (delivering judgment of the court):**

**[1]** Letchumanan a/l Krishnan ('the accused'), was charged for an offence punishable under s 302 of the Penal Code.

**[2]** The charge against the accused was as follows:

> Bahawa kamu pada 16 Mac 2004 jam lebih kurang 9 malam di rumah No 0304, Blok C-5, Taman Ungku Tun Aminah, Skudai, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, telah melakukan kesalahan membunuh dengan menyebabkan kematian ke atas Shamila a/p Raju, SB No: BD 58320, dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan.

**[3]** The accused claimed trial to the charge.

**[4]** The prosecution called seven witnesses to support its case. They were Mariammah a/p Thangavelloo, the mother of the deceased ('PW1'), Corporal Somasundram a/l Sinnapayan, the person who received the first information report ('PW2'), Raju a/l Letchumanan, the father of the deceased ('PW3'), L/Cpl Palansamy a/l Karuppan, the photographer ('PW4'), Corporal Embok Tang Bin Palima, the storekeeper ('PW5'), ASP Mohd Asfanizam Bin Yahya, the investigating officer ('PW6') and Dr Shahidan Md Noor, the pathologist ('PW7').

## THE PROSECUTION'S CASE

**[5]** The salient facts adduced by the prosecution can be summarised as follows:

5.1 On 17 March 2004, at about 10pm, the accused brought Shamila a/p Raju ('the deceased'), to Skudai Police Station whereat he made a police report ('P8'). PW2, Corporal Somasundaram a/l Sinnappayan, received the report. He then immediately informed the investigating officer on duty ('PW6').

5.2 PW6 then examined the body of the deceased and questioned the accused. In his evidence, PW6 testified that during the physical examination of the deceased's body, he had noticed that 'si mangsa mengalami kesan melecur hampir 50% pada keseluruhan tubuh badan beliau'. PW6 instructed a lady officer known as Inspector Juraimah, to take the deceased to Sultanah Aminah General Hospital for a post-mortem to determine the cause of death.

5.3 On the same day, PW6 and the police photographer ('PW 4'), went to the scene at a flat No 0304, Blok C53, Taman Tun Aminah, Skudai to carry out investigations. Several exhibits were seized. The items are:

(a) a kettle ('P7');

(b) Biotine Ointment Cream which was used by the accused to rub the scalded body of the deceased ('P11'); and

(c) one table with a table-cloth ('P6').

5.4 Eight photographs of the scene were taken by PW4 which had been tendered as P5A-H.

5.5 The post-mortem was conducted at about 10am on 18 March 2004 by Dr Shahidan bin Md Noor ('PW7'). 26 photographs were taken at the mortuary by PW4 which had been tendered as P4. PW7 opined that the cause of death was due to head injury.

5.6 PWl, the mother of the deceased, testified that she was hospitalised at Sultanah Aminah General Hospital, Johor Bahru, from 13 March 2004 until 17 March 2004. The accused was asked to look after the deceased. According to PW1, the deceased who was one year old still unable to walk or stand on her own but she can move by using a walker.

5.7 PW1 further testified that PW3, the father of the deceased, was not living together with his family due to some misunderstanding. PW1, her son, her daughter (the deceased) and the accused were living together in a flat No 0304, Blok C53, Taman Tun Aminah, Skudai, Johor Bahru.

5.8 In the course of evidence adduced by the prosecution witness ('PW1'), it was evident that the relationship between the deceased and the accused was good and that the accused loved the deceased.

MAXIMUM EVALUATION

**[6]** Case law authorities state that under s 180 of the Criminal Procedure Code the court is required to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his defence and it involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence.

(See *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 and *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65).

**[7]** It is an established law that the prosecution has to prove the following ingredients in order to make out a prima facie case of murder punishable under s 302 of the Penal Code:

(1) the death of the deceased;

(2) the deceased's death was caused by injury or injuries inflicted on the deceased;

(3) the accused had caused the injury or injuries which resulted in the deceased's death; and;

(4) the act causing the death was committed with the mens rea under s 300(a), (b), (c) or (d) ie, if:

(a) the act is done with the intention of causing death;

(b) it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

(See *Public Prosecutor v Chong Chai* [2006] 3 MLJ 612 per Low Hop Bing J (now JCA) and also *Public Prosecutor v Brahim bin Rais* [1999] MLJU 305 per Ian Chin J).

**[8]** There is no dispute in the present case that the deceased had died as a result of head injuries. The first ingredient of s 300 of the Penal Code has been successfully proven by the prosecution. With regard to the second ingredient, it is obvious from the very outset that the prosecution relied entirely on circumstantial evidence. No direct evidence was presented that the accused murdered the deceased or he was in any way connected to and/or responsible to the crime in question. The substance of the circumstantial evidence adduced during the trial to prove the second ingredient was that the accused was present at the time of the deceased death and the evidence of the pathologist ('PW7') who had testified that 'pada pendapat saya kecederaan ini berlaku kerana dipukul'.

**[9]** The prosecution began its case by asserting a theory of cold-blooded murder. In his opening speech ('P3'), the learned Deputy Public Prosecutor, Encik Husmin bin Hussin ('DPP'), said that the prosecution, through circumstantial evidence, will prove that the accused threw the deceased to the

wall because she kept on crying and also pour hot water on the body of the deceased. The learned DPP posited that there was circumstantial evidence from which the court could conclude that the head injury was inflicted at the time when the deceased was with the accused and the accused directly contributed to the event that physically caused death to the deceased.

**[10]** Encik Gobind Singh Deo, learned counsel for the accused, submitted that the prosecution's evidence was entirely circumstantial. There was no eye witness called in support of the prosecution case. As such, there is nothing on the record which can positively describe how it is the deceased met with her death and more importantly, whether the accused is in any way connected to and/or responsible for it. There are serious gaps in the case for the prosecution rendering it far inadequate for the purpose of establishing a prima facie case by reason of which the accused ought not to be ordered to enter his defence.

## EVALUATION OF EVIDENCE BY THE COURT

**[11]** The prosecution submitted that the deceased was with the accused at the time of her death. At the outset, while an accused's presence at the scene of a crime is a very important factor to be considered in determining guilt, it is elementary that mere presence is not, of itself, sufficient to establish that the person was the perpetrator of the crime.

**[12]** The court determination of whether the accused was, in fact at the scene of the crime, needs not detain it long in view of the testimony of PW1. PW1, the mother of the deceased, testified that she was hospitalised at Sultanah Aminah General Hospital, Johor Bahru, from 13 March 2004 until 17 March 2004. The deceased was under the accused's care and control (Ketika saya berada di hospital OKT yang menjaga anak-anak saya ... Tidak ada orang lain yang membantu menjaga kedua-dua anak saya. Hanya OKT seorang sahaja yang menjaga anak-anak saya). PW1 said that the deceased was still unable to walk or stand on her own but she can move by using a walker. The accused together with her children including the deceased visited her at the hospital on the 13 March 2004. PWl also said that she never saw any scalding marks or any tear to the deceased private part before.

**[13]** Thus, there was indeed evidence from which the court could find that the accused was present at a flat No 0304, Blok C-53, Taman Ungku Tun Aminah, Skudai ('the scene of crime'), at the time of the deceased death. This fact was not in dispute.

**[14]** The accused was proved to be with the accused at the material time but whether it was the accused who caused the injury to the deceased? The post-mortem examination was conducted by Dr Shahidan Md Noor (PW7). The post-mortem report revealed as follows:

POST MORTEM EXAMINATION REPORT ON SHAMILA A/P RAJU

Acting on a request of 'Polis DiRaja Malaysia' (in relation to Skudai police report No 3631/2004), I, the undersigned at 10am on 18 March 2004 (Thursday) within the mortuary of Hospital Sultanah Aminah in Johor Bahru made a post mortem examination and dissection on Shamila a/p Raju.

Birth Certificate No not available.

Age: 1 year

Sex: Female

Race: Indian

Address: No 0304 Blok C-53, Taman Ungku Tun Aminah Skudai, Johor Bahru.

Date and time when brought in: 17 March 2004/11.57pm

The body was identified to me by: Police: ASP Mohd Afzanizam bin Yahya G/14933

EXTERNAL EXAMINATION

The body was that of an Indian female toddler 76 cm long (height) and naked. She weighed 8.720g with head circumference of 45cm. She had luxuriant black hair. She was also well-nourished.

She also showed scalded areas with loss of skin-upper half back of torso 19 x 7cm with smaller scalded areas below it, front upper half of the torso 15 x 13cm with a few smaller scalded areas scattered about the umbilicus, front right knee 10 x 6cm and scalded top of the head 6 x 5cm and forehead 9 x 5cm. Altogether about a quarter of the body surface areas were scalded.

External genitalia was unremarkable save for a superficial stretch tear 5 x 3mm of the posterior vulva with watery fluid oozed from vaginal vault. Rigor mortis had passed off.

INTERNAL EXAMINATION

Head

The scalp showed thick subgaleal haemotoma on back and top of the head. There were soft tissues bleeding in both temporalis muscles. The skull showed crack of fracture on the left occipital from foramen magnum upwards for 8cm about 1cm away from sagittal suture and divided into two limbs of 5cm and 6cm about left parietal eminence. The brain (860g) was swollen and showed no gross bleeding.

Mouth, throat and neck structures

Eight deciduous incisor teeth were present. No abnormality or injury seen in these regions

Chest

The ribcage was intact and its chest wall was intact and uninjured. The pleural cavity was clear and dry. The oesophagus was unremarkable. The trachea and its air passages showed minimal aspiration of gastric effusion. The heart (35g) was of appropriate size and configuration.

Abdomen

The abdominal wall was intact and uninjured and its cavity clean. The stomach contained some milk with porridge-like food material. The liver (320g), spleen and all other organs were intact save for the right kidney which showed some bruisings about the lower pole.

Skeleton

No other bony injury seen apart that described.

OTHER INVESTIGATIONS

A sample of blood was submitted for analysis.

Selected tissues were examined histologically. No significant abnormality was found in all the tissues however there were focal areas of haemorrhages in the cerebellar tissue and lower pole of the right kidney.

Vaginal swabs and anal swabs were negative for spermatozoon.

CONCLUSIONS

I was informed that the mother of this child was warded in Hospital Sultanah Aminah Johor Bahru for a few days. The father worked in Singapore and came back weekly. This child and another brother were looked by a male lodger who had been staying there for a month now in the absence of the parents. An alleged 'accident' occurred when the victim apparently pulled the electrical cord of a kettle of boiling water on the table and this water splashed on to her at night on 16 March 2004 in their house. After that she was apparently alright and thenafter fell asleep. However she was found lifeless in the morning of the following day.

At post-mortem there were scalded areas of the body and internally the skull was fractured with consequent brain injury. This head injury attributed to her sudden demise. The cause of death was given as due to head injury.

CAUSE OF DEATH

1(a) Head injury

'Attested on soul and conscience' sgn

DR SHAHIDAN BIN MD NOOR

AMN, MD (UKM'sia), DFM (Glasgow),

Forensic Pathologist

Hospital Sultanah Aminah

Johor Bahru

**[15]** PW7, during examination in chief, said:

> Atas kepala ada kesan terbakar kerana terkena air panas. Saya berpendapat kecederaan di tengkorak boleh disebabkan oleh jatuh. Walaubagaimanapun, kalau jatuh yang biasa bagi seorang kanak-kanak sukar untuk mendapat kecederaan sedemikian. Pada pendapat saya kecederaan ini berlaku kerana dipukul.
>
> Saya berpendapat walaupun ini suatu kecederaan tumpul, daya yang dikenakan perlu agak kuat iaitu sama ada objek yang bergerak atau si mati bergerak. Sebab kematian ialah kecederaan kepala (otak).

**[16]** During cross-examination by Encik Gobind Singh, learned counsel for the accused, PW7 said:

> Pada pendapat saya kecederaan yang dialami boleh si mati boleh disebabkan benda yang jatuh. Melihat kepada keadaan melecur yang dialami, agak sukar bagi saya menyatakan arah dari mana air panas itu datang.

**[17]** During re-examination, PW7 said:

> Pada pandangan saya kecederaan tersebut boleh disebabkan cerek (P7) yang penuh berisi air jatuh dengan ketinggian tertentu ke atas kepala simati.
>
> Saya tidak berkedudukan untuk menyatakan bahawa kecederaan yang dialami oleh si mati seperti yang ditunjukkan dalam gambar eksh P4 disebabkan cerek yang jatuh.
>
> Ada kemungkinan kecederaan boleh disebabkan oleh cerek yang jatuh.

**[18]** Based on the circumstantial evidence adduced, the proof implicating the accused with the crime in question is paper thin. I find that the cumulative effect of all evidence is insufficient to point conclusively that the death of the deceased was caused by or was a consequence of the act of the accused and that such act was done with the intention of causing death or causing bodily injury sufficient in the ordinary course of nature to have caused her death. What is most notable about the evidence of this case is what is not known. Various pieces of the puzzle are missing, and the court is forced

to engage in speculation to fill in the gaps. There was no sufficient evidence from which the court could be convinced as to what the accused did relative to the crime, when he did it and under what circumstances. The evidence is not capable of supporting any inference beyond that the accused was present at the time of the deceased death. Without more, it is insufficient to support that the accused participated in causing the death.

**[19]** Under the circumstances of the case, there is a possibility that the kettle of water which was on table in the kitchen (exh P7) could have caused the injuries on the deceased if it were full and had fallen on to her. The court does not discount the possibility that the deceased who could move by using a walker had moved to the table and pulled at the sheet of the table and the kettle had accidentally fallen on he head. By looking at the photographs (exhs P5G & H) and judging from the items on the table and the manner in which they were placed on the table, it was possible that the heavier of the weight on the table could be the front and it would be consistent with the table topping towards the front of it when the sheet was pulled. Thus, there is a possibility that the death of the deceased could be accidental.

**[20]** The evidence of the pathologist ('PW7') did not affirmatively or positively suggest that the head injuries sustained by the deceased had been caused by the accused. PW7 testified during re-examination that.

> Pada pandangan saya kecederaan tersebut boleh disebabkan cerek (eks P7) yang penuh berisi air jatuh dengan ketinggian tersebut ke atas kepala si mati Ada kemungkinan kecederaan boleh disebabkan cerek yang jatuh.

**[21]** The totality of circumstantial evidence presented by the prosecution in this case could support two different inferences: (1) the accused was the perpetrator of the crime; or (2) the accused was only present at the scene at the material time and the injuries sustained by the deceased was accidental. In other words, the evidence in the case at hand equally supports more than one version of the event, requiring speculation as to which of the version is correct. It is clear that, at best, the evidence presented at the trial was sufficient to arouse suspicion but could not support an inference that the accused was the perpetrator of the crime. There was not a shred of incriminating evidence presented by the prosecution, whether direct or circumstantial, to substantiate the assertion by the learned DPP that the accused throwing the deceased to the wall because she kept on crying and also poured hot water on the body of the accused. With respect, the assertion is purely speculation and fanciful conjecture.

**[22]** It is axiomatic under our case-law, and we cite the principle repeatedly, that circumstantial evidence alone may be sufficient to support a conviction for murder since the law makes no distinction between circumstantial evidence and direct evidence and, if circumstantial evidence is used to provide for a conviction; it must be inconsistent with any other hyphothesis than that of guilt of the accused, (see eg, *Kartar Singh & Anor v R* [1952] 2 MLJ 85; *Idris v Public Prosecutor* [1960] MLJ 296; *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25; *Chong Kim Siong v Public Prosecutor* [1968] 1 MLJ 36; *Public Prosecutor v Hanif Basree bin Abdul Rahman* [2007] 2 MLJ 320 and *Juraimi bin Hussin v Public Prosecutor* [1998] 1 MLJ 537).

**[23]** Where the evidence is wholly circumstantial, what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. If the circumstancial evidence is such as to fall short of that strand, if it does not satisfy that test, if it leaves gaps, then it is of no use at all, (see *PP v Haniff Basree bin Abdul Rahman* per Mohd Ghazali Yusoff JCA).

**[24]** In the cases where a chain of circumstantial evidence has been established by the prosecution, this court in dealing with evidence of this nature always adopts the views stated by of Faizal Ali J in delivering the judgment of the Supreme Court in *Ram Avtar v The State (Delhi Administration) AIR* 1985 SC 1692, which states:

> At the very outset we might mention that circumstantial evidence must be complete and conclusive before the accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence. We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, eg, where there is a chain of circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. In other words where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated. The learned sessions judge seems to have fallen into this very error. In the instant case, instead of taking all the circumstances together, which are undoubtedly circumstantial and closely linked up with one another, the learned sessions judge has completely misdirected himself by separately dealing with each circumstance thereby making a wrong approach while appreciating the circumstantial evidence produced in the case.
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> ... It is not possible for us to consider the various chains of circumstance, mentioned above, in isolation by divorcing them from the other circumstances which are closely interlinked with them ...

**[25]** The Court of Appeal of Maryland, United States, in *Pressley v State, 295 Md 143* [1983], penned the well-settled law on circumstantial evidence as follows:

> Circumstantial evidence is not like a chain which falls when its weakest link is broken, but is like a cable. The strength of the cable 'does not depend upon one strand, but is made up of a union and combination of the strength of all its strands. No one wire in the cable that supports the suspension bridge across Niagara Falls could stand much weight, but when these different strands are all combined together, they support a structure which is capable of sustaining the weight of the heaviest engines and trains. We therefore think it is erroneous to speak of circumstantial evidence as depending on links, for the truth is that in cases of circumstantial evidence each fact relied upon is simply considered as one of the strands and all of the facts relied upon should be treated as a cable'.

**[26]** No motive was shown by the prosecution for this murder. As I understand it, proof of motive does not establish guilt and motive is not an essential ingredient for this offence (see: *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232). However, in the present case, establishing motive in view of the evidence that the relationship between the deceased and the accused was good and the accused love the deceased, becomes crucial in order to tilt the scale against the accused. This was what said by *Rantanlal & Hirajlal's Law of Crime* (23rd Ed), at p 1159:

> Ordinarily, when there is sufficient, direct and circumstantial, evidence connecting the accused with the commission of the offence the proof of motive becomes unimportant. But where the entire prosecution case rests on circumstantial evidence, motive undoubtedly plays and important part in such cases to tilt the scale against the accused, and if as in the instant case, the prosecution evidence has failed to prove sufficient motive for the murder of his newly wedded wife on the part of the accused-respondent, and the circumstances relied on by the prosecution appeared to be equivocal and not conclusive of his guilt, the acquittal of the respondent as ordered by the High Court must be upheld.

*Whether the police report (exh P8') is admissible*

**[27]** The prosecution sought to introduce a police report lodged by the accused ('exh P8') to link the accused with the crime in question. The report was tendered as an exhibit through PW2, the person who received it at Balai Polis Skudai. Learned defence counsel submitted that exh P8 is inadmissible as it is not the original and its certification is irregular.

**[28]** Now, s 76 of the Evidence Act 1950 provides: A

> Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate, written at the foot of the copy, that it is a true copy of the document or part thereof, as the case maybe, and the certificate shall be dated and subscribed by the officer with his name and his official title, and shall be sealed whenever the officer is authorised by law to make use of a seal, and the copies as certified shall be called certified copies. B

**[29]** In *Norliana bte Sulaiman v Public Prosecutor* [2000] 4 MLJ 752, Augustine Paul J (as His Lordship then was) said: C

> Section 76 uses the word 'shall' in describing the certificate. It is only a prima facie indication that the requirements of the certificate are mandatory. Its true effect depends on the object for which it was enacted. This can be gathered from its concluding words '... the copies so certified shall be called certified copies'. This makes it clear that copies not certified as required by s 76 cannot be called certified copies. In that event they will not have any legal force. Thus in re *Tan Ah Chuan & Anor* [1954] MLJ 135 it was held that if a certificate is not dated as required by s 76 then the copy is not certified copy. This view was adopted in *Mohamed Hanifah v Public Prosecutor* [1956] MLJ 83. D E

**[30]** It is evident that exh P8 is not dated as required by s 76 of the Evidence Act 1950 and, therefore, it is inadmissible. With regard to the evidentiary value of exh P8, it was decided in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 that it is not a substantive piece of evidence and it is inadmissible for the purpose of proving that the facts stated in it are correct. It's evidentiary value is only to contradict the testimony of a witness under s 145 of the Evidence Act 1950 or to corroborate his testimony under s 157 of the said Act. F G

**[31]** Assuming for a moment for the sake of argument that exh P8 was admissible as evidence and it could be used as a piece of substantive evidence, the next question to be asked is whether exh P8 could support the case for the prosecution. Now, the contents of exh P8 is as follows: H

> Pada 16 Mac 2004 jam lebih kurang 2100hrs semasa saya berada di rumah No 0304 Blok C-53 Taman Tun Aminah, Skudai dan saya siapkan air panas dan meletakkan di atas meja untuk buat air susu bagi anak saudara saya nama Shamila a/p Raju umur 1 tahun dan saya telah masuk bilik kemaskan bilik tidur. Lebih kurang lima minit kemudian saya telah terdengar anak saudara saya menjerit dan saya terus ke meja tersebut dapati air panas yang saya letakkan di atas meja telah kena atas tubuh badan anak saudara saya disebabkan alas plastik meja yang ditarik olehnya. Saya dapati sebahagian tubuh badan telah melecur dan saya sapu sejenis krim tempat-tempat yang melecur. Kemudian anak saudara saya telah tidur. I

> Pada 17 Mac 2004 jam lebih kurang 0230hrs Shamila bangun dan menangis dan saya susukan beliau dan terus tidur. Pada 17 Mac 2004 jam lebih kurang 0600 saya dapati Shamila tidak bergerak dan saya percaya beliau telah meninggal dunia. Pada 17 Mac 2004 jam lebih kurang 1200hrs saya telah pergi ke Hospital Sultanah Aminah memberitahu kepada kakak saya Shamila telah meninggal dunia. Kemudian saya datang balai buat repot.

**[32]** The court is of the opinion that even if P8 was to be admitted in evidence, it does not support the prosecution's case because it does not implicate the accused to the charge. On the contrary, the evidence in P8 itself and the evidence by PW 7 are consistent with each other and this creates further doubt in the case for the prosecution.

*Whether there is a gap in the prosecution's case when Inspector Juraimah, the lady officer who brought the deceased to the hospital, has not been called to testify in court*

**[33]** The investigating officer ('PW6'), said that he had instructed a lady officer, Inspector Juraimah, to take the deceased to the hospital for a post mortem. However, she was never called or been offered to the defence. The learned counsel submitted that this is a most serious gap in the case for the prosecution. This is because PW6 who checked the body of the deceased did not mention about the injuries to the deceased's head. There is a possibility the head injury was sustained while on the way to the hospital. Furthermore, there is no evidence by the pathologist (PW7) about the time of death. With respect, there is substance in the submission.

**[34]** The prosecution has discretion whether or not to call a prosecution witness. However, in the present case, the failure on the part of the prosecution to call this witness gave rise to a serious gap in the prosecution case. The issue is simply this. Was the deceased merely unconscious when brought to the police station? When did the deceased actually die? How do we know for sure the injury to the head was not sustained later. In *Teoh Hoe Chye v Public Prosecutor* [1987] 1 MLJ 220, Abdul Hamid CJ (as he then was) said at p 229:

> ... the decision whether to call or not to call a witness including a witness from whom a statement has been taken is always the right of the prosecution (*Abdullah Zawawi v Public Prosecutor* [1982] 2 MLJ 16). Insofar as the trial court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt (*Abdullah Zawawi*'s case).

**[35]** On the maximum evaluation of the evidence before this court, therefore, I hold that the prosecution at the end of its case has failed to establish a prime facie case as required under s 180(2) of the Criminal Procedure Code and the court has no option but to acquit and discharge the accused without having to call upon him to enter his defence.

*Accused acquitted.*

Reported by Andrew Christopher Simon